UNITED STATES DEPARTMENT OF LABOR
BOARD OF ALIEN LABOR CERTIFICATION APPEALS
800 K STREET, NW
WASHINGTON, DC 20001-8002

Date: 10/02/96

Case No. 95-INA-42

In the Matter of:

Diamonds Foods
Employer,

on behalf of

Victor Hugo Bojorquez
Alien.

Before: Guill, Vittone and Wood
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from an employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of alien labor certification. The certification of aliens for permanent employment is governed by section 212(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

We base our decision on the record upon which the CO denied certification and the employer's request for review, as contained in the appeal file ("AF"), and any written arguments. 20 C.F.R. § 656.27(C).

Statement of the Case

On December 16, 1993, Diamond Foods, Employer, filed an application for alien employment certification to enable Victor Hugo Bojorquez, Alien, to fill the position of Supervisor Inventory Control, Frozen Foods. The duties of the job were described as follows:

> Will supervise and coordinate activities in compiling records concerning ordering, receiving, storing, issuing and delivering frozen foods to clients.

Employer required that applicants have two years of experience in the job offered. (AF. 16)

The CO issued a Notice of Findings (NOF) proposing to deny certification on March 4, 1994. (AF. 10-14) The CO stated that Employer had failed to recruit in good faith and had rejected U.S. workers for other than lawful job-related reasons. The CO stated that Employer had rejected all 24 U.S. applicants, stating that seven failed to call back or show interest in the job; three admitted that they were not qualified for the job; and twelve were judged not qualified on the basis of their resumes. The CO stated that contrary to Employer's statements, applicant responses indicate that Employer did not return one applicant's numerous telephone calls and told at least three others that the job was filled. Applicant responses also indicated that Employer did not contact applicants in a timely manner and used delaying tactics to discourage applicants.

The CO instructed Employer to state the lawful job-related reasons for rejecting applicants Murray, Bogosian, Saedeh, Bowman and Overstreet, all of whom appear qualified for the job.

Employer submitted rebuttal dated April 8, 1994. (AF. 8) Mr. Benny Abraham stated that he had contacted each applicant as soon as practicable, by sending a letter to each applicant inviting him for a job interview. Mr. Abraham stated that he was puzzled as to why the CO would believe the applicant's statements rather than his statements and that he never told any applicant that the job was filled.

Mr. Abraham further stated that Mr. Bogosian admitted to him that he is not qualified and that "[t]he other people who applied possess the same qualities."

The CO issued a Final Determination denying certification on July 22, 1994. (AF. 3-6) The CO determined that Employer had failed to document good faith efforts to contact and consider U.S. workers and had rejected U.S. workers for other than lawful job-related reasons.

Employer, by counsel, requested administrative-judicial review on August 9, 1994. (AF. 1)

DISCUSSION

An employer must show that U.S. applicants were rejected solely for lawful job-related reasons. 20 CFR § 656.21(b)(6). Furthermore, the job opportunity must have been open to any qualified U.S. worker. 20 CFR § 656.20(c)(8). Therefore, an employer must take steps to ensure that it has obtained lawful job-related reasons for rejecting U.S. applicants, and not stop short of fully investigating an applicant's qualifications.

Although the regulations do not explicitly state a "good faith" requirement in regard to post-filing recruitment, such a good faith requirement is implicit. H.C. LaMarche Ente, Inc., 87-INA-607 (Oct. 27,1988). Actions by the employer which indicate a lack of good faith recruitment effort, or actions which prevent qualified U.S. workers from further pursuing their applications, are a basis for denying certification. In such circumstances, the employer has not proven that

there are not sufficient United States workers who are "able, willing, qualified and available" to perform the work. 20 CFR § 656.1.

The burden of proof is on Employer to substantiate its assertions that it recruited U.S. workers in good faith. Flamingo Electroplating, Inc., 90-INA-495 (Dec. 23, 1991). When applicant's statements contradict Employer's statements, the CO must resolve the conflict and determine credibility. Pak Trading Co., 90-INA-251 (Apr. 8, 1992).

Employer contends that it recruited U.S. workers in good faith and did not tell any of the applicants that the job was filled. However, the CO reports that applicant Bret Zajac, whom he interviewed on the telephone, reported that Employer told him that the job was filled. (AF. 12) Applicant Pedro Alonso responded to the CO's questionnaire stating that he was told by Employer that the job was filled. (AF. 93-94) Mr. Alonso also detailed repeated efforts to contact Employer to arrange an interview. (AF. 93-94) Applicant John Bogosian responded to the CO's questionnaire detailing his repeated efforts to contact Employer. He reported that he received Employer's recruitment letter on July 12, 1994 and was repeatedly put off until being interviewed on August 13, 1994. (AF. 96-97)

According to the record, Michael Murray and several other applicants were rejected by Employer because, during the interview, they admitted that they were not qualified for the job. (AF. 92) Mr. Murray denies this statement. (AF. 13) There are other similar responses from U.S. applicants in the file. The number and consistency of the applicant responses support the CO's determination that they are entitled to greater weight than Employer's undocumented assertions. Robert B. Fry, Jr., 89-INA-6 (Dec. 28, 1989).

It is clear from this record that Employer did not recruit U.S. workers in good faith and attempted through delay and misstatements to discourage U.S. workers from pursuing their applications. Accordingly, certification was properly denied.

ORDER

The denial of labor certification is AFFIRMED.

Entered at the Direction of the panel by:

Todd R. Smyth
Secretary to the Board of Alien Labor
Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not

favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.